

**LOWER PAXTON TOWNSHIP
ZONING HEARING BOARD**

Meeting of September 27, 2007

Members in Attendance

David Dowling, Chairman
Sara Jane Cate, Vice Chairperson
Jeffrey Staub
Gregory Sirb

Also in Attendance

James Turner, Solicitor
Dianne Moran, Planning & Zoning Officer
James Snyder, HRG, Inc., Township Engineer

**Docket # 1239 and
Special Exception #07-03**

Applicant: Drs. Keith and Dana Fetterolf

Address: 4400 Deer Path Road, Harrisburg, PA 17110

Property: Southwest corner of Colonial Road and Linglestown Road, 35-009-187

Interpretation: No new building, new or expanded vehicle parking, or business outdoor storage shall be located within 75 feet from the center of a perennial creek.
The applicant proposes construction of a parking lot within the 75-foot stream setback.

Structures are prohibited in the Floodplain District.
Applicant is proposing to build a portion of the building within the floodplain.

No variances shall be granted for any prohibited uses listed in Section 504.G.
Applicant is seeking a variance for a prohibited use.

Within the 100-year floodplain, any allowed parking lot that will include spaces for four or more motor vehicles and any allowed commercial or industrial outdoor storage area shall need special exception approval.
The applicant proposes a parking lot for 12 parking spaces within the 100-year floodplain.

Grounds: Section 312.A., 504.G., 504.N., and 504.H.1. of the Lower Paxton Township Codified Ordinances pertain to these applications.

The following were sworn in: Drs. Dana Fetterolf and Keith Fetterolf Applicants; Craig Bachik, Kairos Design Group; James Snyder, HRG, Inc., Township Engineer; and Dianne Moran, Lower Paxton Township Planning and Zoning Officer.

Attorney Stuart Sacks was present on behalf of the applicants.

Ms. Moran testified that the appropriate fees were paid on September 7, 2007. Proper advertisements were made in The Paxton Herald on September 12 and 19, 2007. The property was posted on September 18, 2007.

Ms. Moran testified that the following ordinances apply to the variance request: Section 312.A Creek Setbacks, No new building, new or expanded vehicle parking or business outdoor storage shall be located within 75 feet of the centerline of a perennial creek; 504.G Prohibited Uses, the following uses are prohibited in the Flood Plain District, all structures except for those specifically allowed in Section 504.F and 504.H; and Section 504.N Variances, No variances shall be granted for any of those prohibited uses listed in 504.G. The applicant is proposing to construct a parking lot within the 75-foot setback and to build a portion of the building in the floodplain.

Ms. Moran stated that the property is on the southwest corner of the intersection of Colonial Road and Linglestown Road, and directly in front of the Harriet Too property and across Linglestown Road from Sheetz.

Mr. Sacks gave a brief background on this project. In July, Drs. Fetterolf asked for variances for a building that was about 16,000 square feet and seemed to have a footprint over the floodplain and wetland areas. The variance requests were denied. The applicants have gone back and reduced the building by half to 8,970 square feet. Mr. Sacks stated that they will be showing evidence that the parking spaces and the building are not really in the actual flood plain.

Mr. Dowling stated that the size of the building as presented at the previous hearing was 9,700 square feet.

Mr. Bachik stated that the proposed building has been reduced and the infraction area has been deleted in accordance with the Board's wishes. The building has been reconfigured as well. The flood plain issues have also been revisited with more background of the area. There is a portion of the building in the area currently defined on the FEMA maps, but the mapping has never been corrected to reflect the fill work and the construction done on Linglestown Road. Sheetz did a flood plain study that included modifications south of Linglestown Road but those were not incorporated in the map changes.

The actual floodplain boundary line follows natural contour and is very elevation sensitive, and is not arbitrary. Water flows down hill, and does so following elevation

contours very closely. The arbitrary nature of the line as defined by FEMA is something used as a regulatory line. In order to change that, the applicant has to go through a calculated process. There is a portion of the building and parking lot that lies within the floodplain as currently defined. To address that issue, Mr. Bachik researched the adjoining properties and he presented exhibits showing the results of the floodplain study done at the time of the Sheetz property land development plan. The floodplain line runs to the culvert at Linglestown Road and then protrudes onto the Fetterolf property. This shows the flood plain line at the elevation line of 417. R.J. Fisher and Associates prepared a redefined floodplain line outside the retaining wall and outside the proposed development of the Sheetz. Those calculations and elevations become relevant to the Fetterolf parcel as the study performed shows the floodplain on the Fetterolf site at elevation of 417. Mr. Bachik presented an exhibit that shows the Sheetz property and the Fetterolf property. The 417 elevation was further modified when Linglestown Road was widened and the culvert was extended. During the construction of the roadway, the small finger of floodplain was filled to accommodate the lane extension, and now follows the contours (shown by the yellow line). The arbitrary line is clearly not the same as the actual floodplain boundary based on the 417 foot elevation, which wraps around the Fetterolf site, and the proposed building will not be within that area. The building will in fact be on the 425 foot elevation, which is substantially higher than the 417, as is all of the parking area. Part of the construction includes a wall. The applicants intend to obtain a Conditional Letter of Map Revision (CLOMR) and a Letter of Map Revision (LOMR) once the building has been built. Based on the research, the flood plain is not as defined on the FEMA mapping, and does in fact follow the 417 elevation line. The variance is being pursued to allow the construction within the FEMA floodplain as they continue through the land development process and then redefine the true flood plain.

Mr. Sacks marked the plan showing the original application as Plan #1, and the document with the red and green lines showing the Sheetz property and the movement of the floodplain line as Plan #2, the combination and superimposition of the two plans showing the mapping of line 417 as Plan #3.

With regard to the creek setback variance, Mr. Bachik stated that the parking spaces were originally shown on the western portion of the parking lot, closest to the creek, and those spaces have been moved more east away from the creek towards the building and moved the driveway closer to the creek. That takes the parking spaces, which are not permitted in the creek setback, out of the setback area, and the driveway, which is permitted, into the 75-foot setback area. If Staff has a different interpretation, the variance will be needed, but if the applicants' interpretation is accurate, the variance is not needed.

Mr. Dowling asked the applicant to indicate on the exhibits the reduction of the building size. Mr. Bachik showed where the building had been originally in the 20-foot wetland setback area, and now is not.

Mr. Dowling asked if there is any intrusion into the wetland setback area as the plan is now. Mr. Bachik answered that there is not.

Mr. Sacks asked if there is any problem with the building setback line. Mr. Bachik answered that there is not.

Mr. Sacks asked if there is any problem with the front, side or rear yard setbacks. Mr. Bachik answered that there is not.

Mr. Dowling asked for renditions of the project. Mr. Bachik presented a drawing of the project, showing masonry structure, varied roof lines complimentary to the neighboring buildings and area, specifically the Harriett, Too building. The project has an attractive look for the Linglestown Road corridor. Mr. Bachik directed the Board to the east elevation as seen from Colonial Road which is the main entry for patients, the north elevation as seen from Linglestown Road, and the southern elevation as seen from the Harriet Too building across the wetlands.

Mr. Sacks asked if the construction would create any danger to life or property in the area. Mr. Bachik answered no.

Mr. Sacks asked if it would cause disease or unsanitary conditions. Mr. Bachik answered no.

Mr. Sacks asked if the application would satisfy the standards set forth in Section 504.I. Mr. Bachik answered yes.

Mr. Staub asked if the Board is concurrently considering the variances and the special exception. Mr. Sacks answered yes.

Mr. Sacks stated that the request for special exception is for parking within the creek setback. The paved area will be within the setback area, but the actual parking spaces will be out of that area. The variances requested are for the corner of the building only. Mr. Sacks felt that the requests presented were de minimus.

Mr. Sirb asked if 950 square feet is still within the floodplain. Mr. Bachik stated it is within the floodplain, as currently defined by FEMA, but it is outside what they believe to be the true floodplain as defined by the 417 elevation line.

Ms. Cate asked why the applicant did not go to FEMA first to work out the problem. Mr. Bachik stated that a LOMR requires a significant amount of engineering effort and is very costly. The applicant wants to know there is a reasonable assurance that the project is viable before going through that lengthy process. Going to the Township is more prudent than going through the federal government if it will fail. They do intend to work through the FEMA process in conjunction with the land development process.

Ms. Cate asked if the applicant is asking the Township to make a decision prior to the outcome of the FEMA process. Mr. Sacks stated that there is precedence with this Board in issuing conditional approvals based on obtaining certifications. He recognized that there could be no issuance of a building permit until the CLOMR is obtained. Mr. Sacks stated that if the applicant had already gotten that FEMA approval, the variances and special exceptions would not be necessary. They want some endorsement prior to proceeding with the engineering and development costs that lie ahead.

Mr. Staub stated that section 504.N.1.d. says no variances shall be granted for any prohibited uses listed in 504.G. The Zoning Hearing Board does not have the authority to grant the variance. Mr. Staub agreed with the applicant that the floodplain is not where FEMA says it is, but the Board cannot violate its own ordinance. Mr. Sirb felt it could be conditionally granted, if the applicant can get the change approved by FEMA, since technically the Board would not be permitting any construction within the flood plain. If they do not get it, it will not be constructed, and if they do, they do not need the variance.

Mr. Sacks stated that the ordinance does provide for variances and the Board has the opportunity to interpret under 504.N and he acknowledges that there can be amendments where it shows for good cause and will not jeopardize the Township's flood insurance program. Mr. Sacks did not feel the variance would be a violation of the ordinance and asked the Board to consider that interpretation.

Mr. Sirb stated that if the LOMR is approved, the variance is not needed. Mr. Sacks agreed, and would withdraw the application.

Mr. Dowling asked the Township Engineer's interpretation of the ordinance with regard to the parking within the creek setback. Mr. Snyder stated that the definition of "parking" in the ordinance says "off-street parking and aisles for vehicle movement unless otherwise stated...". Mr. Snyder's interpretation is that the parking lot is indeed parking, and located within the creek setback. The variance for creek setbacks would need to be granted in order for the parking lot to be located where it is proposed. Mr. Staub noted that a special exception may be granted for parking within the flood plain unless it violates the 75-foot creek setback.

Mr. Staub asked about the dumpster pad shown on the plan, and asked if the dumpster is considered outdoor storage.

Mr. Snyder agreed that the FEMA floodplain line is obviously overstated, and when they do the analysis they will find that the building will probably be outside the flood plain and a significant portion of the parking will also be outside the floodplain. That is still to be determined however.

With regard to whether the Board may grant the variances, Mr. Turner stated that if the applicant is successful with the LOMR, they do not need a special exception for

parking. The variance from the 75-foot creek setback is the only one that needs to be acted on. All of the other requests go away when the LOMR is approved.

Mr. Snyder noted that the 75-foot creek setback ordinance will change in the near future from 75 feet from the center of the creek to 50 feet from the top of the bank. The parking lot will not meet that criterion either. The top of the bank is the normal water surface.

Mr. Turner advised that the Board only needs to consider the variance for the creek setback. Mr. Sirb asked if the Board should still put the conditions upon the other requests. Mr. Turner stated there is no need to approve a variance that is not going to be needed. If a variance is conditioned upon a condition which eliminates the need for the variance, a variance is being created that doesn't need to exist. Mr. Sirb asked what happens if FEMA doesn't agree. Mr. Turner stated they would not have met the condition, so the variance would not have been met anyway.

Mr. Sirb asked if there are any other obstacles as far as the Township goes. Ms. Moran answered no.

The Township had no further comment.

There was no comment from the audience.

Mr. Staub referred the rest of the Board to Section 504.H on page 5-8 and read: "Within the 100-year floodplain, any allowed parking lot that will include spaces for 4 or more motor vehicles and any allowed commercial or industrial outdoor storage area shall need special exception approval. Such uses shall not be allowed if they would violate Section 312." Mr. Turner stated that would not be relevant if the land is redefined to not be in the floodplain. That means that the Special Exception does not need action either.

Mr. Sirb commented that this is a prudent business move, however it would have been cleaner to do it the other way around. If the Township Engineer feels somewhat confident that this is a reasonable assessment of where the floodplain would be, then he is comfortable with it.

Mr. Turner stated that if the Board were inclined to approve the variance for the setback, no parking lot would be able to go in there until they get the LOMR because until then, that portion of the property is still in the floodplain.

Mr. Sirb was not sure this was the de minimus variance, but agreed it was the de minimus variance to make the property work, because of the difficulty of the land and the concentration of the development that has occurred in recent years.

Mr. Dowling asked about the interest in crossing the wetlands to create an access through the Harriet Too property. Mr. Sacks stated that is not being discussed anymore. Mr. Dowling cautioned that this Board would be highly unlikely to grant such a large intrusion. Mr. Sacks agreed to take the advice.

Mr. Turner advised that the other variances and special exception be denied so there is no chance of a deemed approval for lack of action.

Mr. Sirb made a motion to grant Variance #1239 with regard to Section 312.A, Creek Setbacks, conditioned upon the applicant obtaining a Conditional Letter of Map Revision (CLOMR). Mr. Sirb further moved that the other variances requested, including Special Exception 07-03, be denied, on the grounds that they will be mute when the floodplain line is redefined. The motion includes an 18-month time period. Mr. Staub seconded the motions.

A role call vote followed: Mr. Staub-Aye; Mr. Sirb-Aye; Ms. Cate-Aye; Mr. Dowling-Aye.

The hearing ended at 7:54 pm.

Special Exception #07-05

Applicant:	Gary & Lisa Koup
Address:	6254 Harding Avenue, Harrisburg, PA
Property:	6254 Harding Avenue, Harrisburg, PA Tax Parcel #35-008-203
Interpretation:	A Drawing and Painting Art Class is a major home occupation, and a major home occupation requires a Special Exception. Applicant wishes to continue the operation of a drawing and painting art class at Harding Avenue.
Grounds:	Article 306.B.1 of the Lower Paxton Township Codified Ordinances pertains to this application.

The following were sworn in: Gary Koup and Lisa Koup, Applicants; and Dianne Moran, Planning and Zoning Officer.

Ms. Moran testified that the appropriate fees were paid on September 4, 2007. Proper advertisements were made in The Paxton Herald on September 12 and 19, 2007. The property was posted September 18, 2007.

Ms. Moran testified that Article 3, Section 306.B.1 of the Lower Paxton Township Codified Ordinances, pertains to this special exception application. A drawing and painting art class is considered a major home occupation and a major home occupation requires a Special Exception. The applicant wishes to continue the operation of a drawing and painting art class at 6254 Harding Avenue.

Ms. Koup stated she has taught drawing and painting out of her home for 21 years. She did not realize she needed anything from the Township to do so. She teaches children. She has been given an award this year from Dauphin County declaring April 14th Lisa Koup Day, as well an award from Pinnacle Health called the Children's Friend Award. Ms. Koup stated she teaches between four and eight children per class. During the summer the numbers are less.

Parents drop the children off at Ms. Koup's home for an hour and a half class, then the parents come back to pick up the children. There are no teenagers driving, there is only one parent who stays during the class, and her child has cancer. Many kids carpool as well. Ms. Koup stated she does not teach on Tuesday nights, and teaches two classes on Thursday evenings, but would be willing to change one of them to Tuesday, as a compromise.

Ms. Koup stated she submitted several letters of support from her neighbors with her application, and has another one to present tonight.

Mr. Dowling asked how many nights Ms. Koup teaches a week. Ms. Koup stated she teaches four evenings and Saturday mornings.

Mr. Dowling asked how many students are in each class. Ms. Koup stated there can be from four to eight students in each class. There tends to be less in the fall because other activities start with the school year.

Mr. Dowling confirmed that there is one 1½ hour class each of those days and asked if there are days that she teaches more than one class a day. Ms. Koup stated that she teaches two classes on Thursday evening. She does that to be able to not work Tuesday to accommodate her daughter's activities. She offered to move one of the Thursday classes back to a Tuesday, to only have one class per day. The Monday class runs from 5:15-6:45 pm, Wednesday is from 6:00-7:30 pm, Thursday is from 6:00-7:30 pm, Friday is from 4:30-6:00 pm and Saturday is from 11:00 am – 12:30 pm.

Mr. Staub asked if any parents stay at the house during the class. Ms. Koup stated that one parent stays because her child has cancer, but all other parents drop the child off and come back at the end of the class to pick them up.

Mr. Dowling asked the general geographic draw of the students. Ms. Koup stated a lot come from Forest Hills, a lot from Nyes Road, from Sunnyhill and Rutherford area, as well as some from as far away as Duncannon.

Mr. Dowling asked the ages of the students. Ms. Koup stated from age 5 to age 18, and the classes are age appropriate.

Mr. Sirb asked how long the applicant has been teaching this class. Ms. Koup has taught in her home at this location for 21 years. Ms. Koup stated many of the neighbors have at one time or another had a child in her class.

Mr. Sirb asked if she does any advertising. Ms. Koup answered that she does not advertise at all, there is no sign, no ad in the newspaper, no ad in the yellow pages. She stated it started as a few classes to make some extra money as a new mom and has grown.

Mr. Turner asked if there is any evidence outside the home that there is a business inside. Ms. Koup answered no. Mr. Turner asked if there is any storage of materials outside the home. Ms. Koup answered no. Mr. Turner asked if there is any chemicals, odors or other evidence of a business outside the home. Ms. Koup answered no, and noted that she teaches acrylics, water colors and pastel and penning. She does not teach oil painting which would call for turpentine.

Mr. Dowling asked Ms. Koup's background. Ms. Koup stated she has an Associate's Degree in art from the Academy of Art.

Mr. Sirb asked Ms. Moran why an "art studio" is classified as a major home occupation, and asked if this is really a studio. Ms. Moran stated for it to be classified as a minor home occupation there has to be no visitors or customers coming to the house.

Mr. Dowling asked if classes are ever taught outside. Ms. Koup stated many years ago she took children outside to do splatter-paint for up to a half hour. She has stopped doing that, and has not for almost six years.

Mr. Staub asked about the possibility of the business being pre-existing non-conforming. Mr. Turner stated that it could only be pre-existing non-conforming if at the time it started there were no ordinances pertaining to it, or it was a permitted use at the time. Mr. Turner felt there probably were ordinances in effect at that time, so the business had technically been in violation all this time.

Ms. Koup presented another letter in support of the business, to add to those submitted with the application.

Mr. Turner noted that in 21-years time, one complaint has been generated. Ms. Moran noted that there was a complaint in 2005 from the same complainant, but at that time, Ms. Koup was very ill, and the Township did not pursue the matter.

Ms. Cate stated that there appears to be a problem with parking and that the driveways in the neighborhood are narrow. Ms. Koup stated that she has a double driveway and her cars are off the road.

Mr. Dowling called for comments from the audience.

Robert Miller of Swatara Township, was sworn in. Mr. Miller stated he is Ms. Koup's father, and he has spent a lot of time over the years at the residence in question and there is never any issue with parking or cars lined up to get to the house or horns being used or anything of that nature. He verified Ms. Koup's statement that parents drop the kids off and leave. Mr. Miller stated that Ms. Koup was sick with cancer, and she teaches children that are mentally and physically disabled, and has helped countless children. He noted that an adult that had been a student of hers in the past came to thank her.

Donald Lynn, 6258 Harding Avenue, was sworn in. Mr. Lynn stated he is the person who has filed the complaints. He is 100% behind Ms. Koup. The reason he complained in 2002, 2005, and 2006 is traffic. Within the last two years, the area has been overwhelmed with traffic. The neighbors in Winchester Park complained about traffic and the Township did something to help alleviate the cut-through traffic. That is the problem in Mr. Lynn's neighborhood. People cut through from Wenrich to the ball

fields. He felt that the class would be more appropriately located in a store front or a church that would have ample parking. There are other businesses in the neighborhood such as landscapers and their trucks cut the corner at his house. Mr. Lynn explained that he was not taking issue with her good will, only with the traffic generated. People who do not live in the neighborhood do not have any regard for the neighborhood they are driving through, and he has had his vehicle damaged twice sitting in front of his house, not from Ms. Koup's customers, but from traffic in general. He does not want the additional traffic.

Alvin Knaub, 6250 Harding Avenue, was sworn in. Mr. Knaub stated he lives two doors down, the opposite direction as Mr. Lynn. He has lived there since 1985 and is also concerned about traffic. He hasn't seen an increase in traffic. He felt that the vehicles coming to Ms. Koup's home did not have anything to do with an increase in traffic. He noted that the new high school has increased traffic on Wenrich Street. Mr. Knaub felt the parents coming to Ms. Koup's home have behaved respectfully, and they do not park and stay, they do not create any noise or disturbance. Mr. Knaub stated he now has grandchildren coming to his house and did not feel Ms. Koup's business added greatly to the traffic in the area.

Chris Koup, 6254 Harding Avenue, was sworn in. Chris Koup is Ms. Koup's son. He stated that there are other businesses in the neighborhood that produce more traffic than his mother's. He stated there is no proof that you can tell the difference between the business in his mother's home or the other businesses, they run at the same time. Chris Koup felt it was ridiculous that the complainant was singling out Ms. Koup and not the other businesses. He stated that there are at the most two students that drive, and the others are all driven by their responsible adult parents.

Mr. Dowling explained that the zoning of the area is R-2, Medium Density Residential District, meaning only single family homes are permitted. If someone wants to operate a business out of their home, they have to go through the special exception process to do so.

Mark Huntington, Colorado Avenue, does not live near the subject property, but asked if the traffic is a violation in the R-2 zone. Mr. Dowling stated that the business itself is the violation, not specifically the traffic. Mr. Huntington asked who enforces those rules, the police or the Township. Mr. Turner stated it is not a criminal matter, it is a zoning violation.

Mr. Sirb asked if the same rules apply to the R-1 as the R-2 zoning districts and if businesses require a special exception in both. Ms. Moran stated that is correct.

Mr. Dowling asked for the Township's position on this application. Ms. Moran had nothing further to add.

Mr. Sirb made a motion to grant Special Exception 07-05, based on the testimony presented, with the stipulations that, (1) the classes be limited a maximum of eight students at a time, and (2) the classes be limited to Monday, Wednesday, Thursday, Friday, and Saturday, with no Sunday classes or daytime classes. Ms. Cate seconded the motion.

Mr. Sirb commented that he is reluctant to approve home based businesses because he feels that the residential zones should be kept strictly residential. He noted that over 21 years it has not created any exceptional hazard, differences in the environment, or character of the neighborhood. He strongly advised that the applicant make sure that the residence always appears as a residence, and that there be no outward indications of a business going on inside.

A roll call vote followed: Mr. Staub-Aye; Mr. Sirb-Aye; Ms. Cate-Aye; and Mr. Dowling-Aye. Special Exception 07-05 was granted.

The hearing ended at 8:31 pm.

Special Exception #07-06

Applicant:	Cindy Lee Berger
Address:	5036 Utah Avenue, Harrisburg, PA
Property:	5036 Utah Avenue, Harrisburg, PA Tax Parcel #35-057-112 5510 Allentown Boulevard, Harrisburg, PA Tax Parcel #35-032-108
Interpretation:	A Monkey shall only be allowed to be kept as a pet if the Zoning Hearing Board approves a particular number and type of species as a special exception after the applicant proves that it will not cause nuisances or hazards. Applicant wishes to possess one additional female capuchin monkey. The applicant currently possesses one female capuchin monkey. The monkeys will be housed at 5510 Allentown Boulevard during the week and 5036 Utah Avenue during the evenings and weekend.
Grounds:	Article 403.D.12(g)1 of the Lower Paxton Township Codified Ordinances pertains to this application.

The following were sworn in: Cindy Lee Berger, Applicant; and Dianne Moran, Planning and Zoning Officer.

Ms. Moran testified that the appropriate fees were paid on September 4, 2007. Proper advertisements were made in The Paxton Herald on September 12 and 19, 2007. The property was posted September 18, 2007.

Ms. Moran testified that Article 403.D.12(g)1 of the Lower Paxton Township Codified Ordinances, pertains to this special exception application. A Monkey shall only be allowed to be kept as a pet if the Zoning Hearing Board approves a particular number and type of species as a special exception after the applicant proves that it will not cause nuisances or hazards. The applicant wishes to possess one additional female capuchin monkey. The applicant currently possesses one female capuchin monkey. The monkeys will be housed at 5510 Allentown Boulevard during the week and 5036 Utah Avenue during the evenings and weekend.

Mr. Sirb asked if the ordinance was in effect when the applicant got the first monkey. Ms. Moran answered no, and the monkey at that time was a pre-existing non-

conforming condition, and should she ever desire another monkey, it would require a special exception from the Township. The addition of a second monkey is what brings it before the Zoning Hearing Board.

Ms. Berger testified that the first monkey's name is Kayla, and the proposed companion monkey is Molly.

Ms. Berger explained that in order to get a permit from the Pennsylvania Game Commission she must obtain a letter from her municipality. Ms. Berger has had Kayla for almost five years. When she got her, there were no laws requiring permits for monkeys at the Game Commission. She had done volunteer work with a zoo in New Jersey. To the best of her knowledge, there was nothing required to have a monkey from the federal, state or local government. Once she brought her home, she contacted the Township and the Game Commission to see what permits were needed. At that point the Game Commission told her she could not have a monkey as a pet, but could not cite any laws saying so. The Game Commission cited Ms. Berger for having the monkey and the case went before Judge Wenner, who found her not guilty for lack of laws prohibiting the monkey.

As Ms. Berger is trying to straighten out the legalities, the monkey is with a friend in Ohio, where there are other monkeys. Kayla has befriended another capuchin monkey. It is not healthy for capuchins to be alone in the first place, being social creatures. Ms. Berger is trying to get the special exception from the Township, re-apply for the Game Commission permit, and bring both monkeys home.

Mr. Sirb asked why Ms. Berger has to "re-apply". Ms. Berger stated that the Game Commission is making her wait a 2-year waiting period to get the permit because they feel she violated their laws.

Mr. Sirb asked what the permit would allow. Ms. Berger stated the permit is to allow the monkeys in the State of Pennsylvania.

Ms. Cate asked the size of a capuchin monkey. Ms. Berger stated that Kayla is eight pounds, about one foot tall when she stands on her two back feet. Ms. Cate stated that monkeys usually stand on two feet. Ms. Berger stated that is not true, that monkeys typically walk on all fours. Ms. Berger compared Kayla to a Pomeranian.

Ms. Cate asked how the monkeys are transported from the home to the business. Ms. Berger stated she goes in a carrier.

Mr. Sirb asked about the Game Commission's regulations. Ms. Berger stated that when she got Kayla, there were no laws on the books, and there still is none, but they say she cannot have a monkey.

Mr. Staub asked about the District Judge's decision. Ms. Berger stated that the Game Commission cited her for endangering the public and another citation. The Judge chastised the Game Commission representative for not having any regulations about monkeys in the year 2005, and ruled not guilty. At that point Ms. Berger asked if she could bring her home from Florida. Judge Wenner advised against it.

The Game Commission says you cannot have a monkey as a pet. Ms. Berger is now applying for a menagerie permit, which means the monkeys are used for volunteer work. When Ms. Berger lived in Florida, she lived near a zoo, and would take Kayla there and educate the public about capuchin monkeys, as well as discuss the program "Helping Hands", which is a program where this type of monkey is trained to assist the quadriplegics (completely paralyzed persons).

Mr. Dowling asked how the menagerie permit applies to what the monkeys will do in Pennsylvania, and how will they be anything other than a pet. Ms. Berger stated she will be housed at Mid Atlantic Recovery Service (MARS), and will be a mascot for the business, which is a towing and auto repair shop. Mr. Dowling asked how a monkey is related to towing. Ms. Berger stated that customers and their children can watch the monkeys while vehicles are being serviced. Ms. Berger will not make money with the monkey. Ms. Berger stated she has done work with Northside Elementary School, for a service animals program. Ms. Berger stated they have also done work with Hurricane Katrina through the Red Cross, where the monkey went to functions they held nightly for the homeless. She has also allowed a news team to film Kayla for evolution.

Mr. Dowling stated the monkey is not a mascot for the business when she is at the Berger's home. Ms. Berger agreed, noting that Kayla is diabetic, and requires an insulin shot every morning, so she cannot permanently leave her at the business location.

Mr. Sirb stated he is concerned that this Board is being asked to make a decision, with very little experience, regarding something that the Game Commission, who is probably an expert at this, feels should not be allowed in Pennsylvania. Ms. Berger stated the Game Commission does not want people to have monkeys as pets in Pennsylvania. Mr. Sirb felt that was reasonable. Ms. Berger agreed. Mr. Sirb thought the Game Commission should first give their blessing before the Township makes such a decision.

Ms. Berger stated that she cannot bring the monkeys back to Pennsylvania until she has the Game Commission permit in place. Part of obtaining that permit requires a letter from the Township granting permission on the local level. She will also have to provide health certificates, training documents. Mr. Sirb asked if that applies to both monkeys. Ms. Berger explained that she will have the permit in two months for Kayla alone to come back. The reason for reapplying is to bring the second monkey. Kayla has developed a companionship with another female monkey, and to separate them at this point would jeopardize her health.

Ms. Cate suggested that Ms. Berger was stretching the menagerie when the monkeys are really just two pets. Ms. Berger stated she is her pet, and she loves her like a daughter. She is also utilized as a mascot for the business, and she has been photographed for a book that will come out in December. Ms. Cate asked about the book. Ms. Berger did not know the specifics of the book, because she works with the illustrator only.

Mr. Dowling asked if capuchin monkeys are the organ grinder monkeys. Ms. Berger answered yes.

Mr. Dowling stated that he has read on the internet that capuchins live together in groups of six to forty members, consisting of related females and their offspring, and several males. The groups are dominated by a single male who has primary rights to mate with females of the group. The source says the monkeys weigh up to two pounds thirteen ounces. Ms. Berger agreed the information was correct with the exception of the size, noting that they are between four and ten pounds.

There was no one present on behalf of the Game Commission.

Mr. Staub asked if the monkeys are tame or domesticated. Ms. Berger stated she brought a video of some of Kayla's typical activities to demonstrate that she does not hang from the chandeliers. Organ grinder monkeys are high strung but are extremely intelligent. That is why they are used for the Helping Hands program. Capuchin monkeys do not carry the viruses that the African monkeys carry, such as Herpes B. There have been no cases in the United States of a monkey carrying rabies. The monkeys are tested yearly, and they get vaccines, just like a household dog would get.

Ms. Berger referred the Board to the two letters attesting the information about the viruses submitted with her application.

Due to technical difficulties, the video was unavailable. Ms. Berger stated that the video was a compilation of various activities, including bathing and Ms. Berger giving Kayla her daily insulin injection, and general behavior.

Ms. Berger stated that if this Board denies her request, she will still bring back Kayla, but without Molly. She hopes not to do that because it will jeopardize her health. She has a permit for her and has had it for the past three years in the state of Florida. When they lived in Florida for five months, she had absolutely no problems. When they left Florida for business reasons, the Berger's came back to Pennsylvania and Kayla went to Ohio, and they visit her every other weekend.

Mr. Dowling asked who Kayla lives with in Ohio. Ms. Berger stated that the lady who has her is USDA certified, Bonnie Poe, who has other capuchin monkeys. The problem is that she has become attached to another monkey. It is good for her to have a companion, but makes things complicated for the Berger's.

The Helping Hands program places single capuchin monkeys in a household for ten years to become acclimated to humans and human living. They do not allow them with another capuchin. So, it is possible to have a single monkey, however, it is not in their best interest.

Ms. Berger stated she had had Kayla here for three years and had no problems, such as noise or odors, until the problem with the Game Commission and had to remove her from the State.

Mr. Staub asked how the Game Commission became aware of the monkey. Ms. Berger stated she found out that monkeys were not allowed to be here, and did research through attorneys and representatives offices, and found information of other people that have had similar trouble with the Game Commission. Instead of fighting the government, she decided to apply for the menagerie permit and keep her out of state until that is obtained. Someone saw the monkey in public and questioned the Game Commission. Because she was seen in Pennsylvania the Game Commission considered that a violation and has made Ms. Berger wait two years before she may apply for the menagerie permit.

Mr. Staub asked if Ms. Berger will be the first person in Pennsylvania to have a pet monkey. She answered no, stating that there are other menagerie permits throughout Pennsylvania, including someone in Enhaut that has more than ten monkeys. Ms. Berger does not intend to have ten.

Ms. Cate suggested that Ms. Berger is asking for permission to have a monkey that the State does not want her to have. Ms. Berger stated that is not true, the Game Commission is issuing the menagerie permit for Kayla in a few months, all of her paperwork is in order for Kayla only.

Mr. Dowling asked about the personality of the second monkey. Ms. Berger stated that they visit the monkeys every other weekend, and Molly is only seven months old, and they work with her when they go visit.

Mr. Staub asked if Ms. Berger will need another menagerie permit for Molly. Ms. Berger stated that one menagerie permit allows for a pair of capuchins. The cage requirements allow up to a pair. If she wanted more than that, the cage requirements are different. Once permission is granted from the Township, the Game Commission's permission allows up to a pair.

Mr. Sirb suggested that the menagerie permit will allow Kayla as a pre-existing non-conforming use. The second monkey needs the Township's approval, for the Game Commission to allow two monkeys.

Ms. Berger explained that if she gets the special exception, she will reapply for two capuchins, and if the special exception is denied, she will reapply for one capuchin.

Ms. Cate asked how many capuchins Ms. Berger can have based on the permit. Ms. Berger answered two. Ms. Cate asked if she ever intends to have ten or eighteen. Ms. Berger answered no, noting that if she had to do it all again, she would have none. There are different requirements for more than two monkeys.

Mr. Dowling asked if the Game Commission monitors where the animals are kept, and how often. Ms. Berger stated they inspect the cages. They can inspect at any time, and the permit is renewed annually, so she suspects that they inspect at least every year.

Mr. Dowling asked how Ms. Berger came to be involved with capuchin monkeys. Ms. Berger stated that she has always loved animals, and became scuba-certified, and was unable to fulfill the attendance requirements, so she decided to do volunteer work at a zoo. During her time volunteering, she fell in love with the capuchins.

Mr. Staub asked about a veterinarian for Kayla. Ms. Berger stated that Dr. Clements in Palmyra and the Colonial Park Animal Clinic treated Kayla. There are also some in Philadelphia and Maryland. While in Ohio, there is a veterinarian that visits USDA certified homes. That vet travels across the United States.

Mr. Staub asked if Kayla has juvenile diabetes, noting that his 26 year old daughter has it and it is tough. Ms. Berger agreed it is difficult. Ms. Berger stated it is difficult because she cannot explain to Kayla why she gets a shot everyday, although she does come and lay down for the shot without problem.

Ms. Berger stated that Kayla is not a chimpanzee or ape swinging around, she is very well behaved and very loved. Ms. Berger stated that if she had to do it again, she would not do it. They do not belong in people's homes, but at this point with her special needs, she cannot be reintroduced to a group.

Ms. Cate asked why Ms. Berger would get a second one if she wouldn't do it all again. Ms. Berger stated it is in the best interest of Kayla to have a companion. Capuchins are very social animals and need socialization and need each other.

Mr. Sirb felt the non-conforming Kayla was not a problem, but he was reluctant to grant a second one of something, that is not a de minimus request.

Ms. Berger stated it is not in Kayla's best interest to leave Molly. Mr. Sirb stated Kayla should stay in Ohio if it is in her best interest. He noted that there is an alternative other than living in the State of Pennsylvania. Ms. Berger stated that Kayla has caused no problems here. Mr. Sirb did not argue the keeping of Kayla. Mr. Sirb felt the Board should not step out onto a ledge to bring a second monkey here. Ms. Berger stated that a

second monkey is no different than a second gerbil because it doesn't bother anybody. Ms. Berger explained that she had no choice in sending her to Ohio, but when she visits all Kayla does is cry when she gets there and when she leaves. Ms. Berger stated that when they were together in Florida, Kayla was totally off her insulin, but now they cannot get her off insulin, and she is at seven units because she is not mentally right and not where she wants to be. Mr. Sirb stated Ms. Berger should bring her back. Ms. Berger stated that she would create even more stress because she would then be separated from Molly. Mr. Sirb stated that is very difficult. Ms. Berger stated that if she does not bring Molly, she cannot justify bringing Kayla back because of her health. Ms. Berger stated that they moved to Florida so they could be together, but there were problems with the business that required the Berger's to be here. She stated she has been very respectful of the Township and its laws. Ms. Berger stated that this has almost destroyed her business and her marriage.

Mr. Dowling called for comments from the audience.

Tammy Schell and Ross Schell were sworn in. They live at 203 Knollwood Drive, up the hill from the Berger's home. Mr. Schell stated that the definition of the monkey is wild, and this monkey is domesticated. Mr. Schell felt that having a second child to be a companion to the first child is the same as what Ms. Berger is asking for. Ms. Schell stated that this monkey is better behaved than most children. Mr. Schell stated that they are not aggressive, and behave better than a three-year-old child, and you'd never know it was there. Ms. Schell stated that the children in the neighborhood behave worse than the monkeys do. Ms. Schell also noted that Ms. Berger takes better care of those monkeys than some parents do of their children. Ms. Cate asked if the Schell's have seen Ms. Berger with both monkeys. Ms. Schell stated they have only seen her with the first one. Ms. Schell noted that dogs in the neighborhood are more of a threat than the monkey.

Mr. Sirb agreed with the premise that the monkeys need each other, and that Kayla's health won't improve without the companionship. Ms. Berger stated it would be another tragedy in Kayla's life, not unlike being removed from Ms. Berger, who is in essence her mother figure. Ms. Berger sent her to Ohio voluntarily so that the Game Commission could not take her, which would probably have killed her. Taking her to Ohio was gradual. Ms. Berger does not want to separate her from her family again. Kayla does not cause a disturbance, even dogs bark, but monkeys do not. There is no odor to the cages or surroundings. Ms. Berger did not see where the Township had any problem. If there is a problem, the stipulations for the Game Commission are so strict that they would not grant a permit.

Mr. Dowling asked for the Township's position on this application. Ms. Moran had nothing further.

There was no additional comment from the audience.

Mr. Turner advised the Zoning Hearing Board that the standard which they are acting on is not the same as a variance, and the Board should follow standards set forth in 403.D.12(g)1, that a determination shall be based on a particular number or type of species, and if it would cause a hazard or nuisance.

Ms. Berger stated that for the three years Kayla was here, she was never a nuisance.

Mr. Sirb asked if Ms. Berger was somewhat certain that the Game Commission would grant the menagerie permit if the Township grants this, and the menagerie permit allows two capuchin monkeys. Ms. Berger stated yes.

Mr. Dowling stated that no evidence has been provided to say that the menagerie permit is good for two monkeys. Mr. Turner advised that the Board could condition its action upon the applicant providing sufficient documentation. Mr. Sirb stated that if he had an assurance that the Game Commission was just waiting for the Township's blessing, then he thought it would be okay for the applicant to have two capuchin monkeys. Ms. Berger stated that there are cage requirements are 6'x6' or 6'x10' for a pair of capuchins, there are no regulations for a single capuchin or a single bird, the permit is for a pair. If she wants more monkeys, she has to have a bigger cage, and apply for such.

Mr. Dowling asked what if the monkey had become attached to three monkeys, and why it is the Township's problem that Kayla has gotten attached to another monkey. Ms. Berger stated it is not the Township's problem that she got attached to a monkey in the first place. It is not healthy for a capuchin to be housed alone. Mr. Dowling stated that Kayla lived alone for three years. Ms. Berger stated that she was a baby, and now that she is getting older she needs more than Ms. Berger as her mother. Ms. Berger stated it was never her intention to get a seconded monkey. As she has done more studying and research, it is apparent to her that it is not healthy. Even though the Helping Hands insists that the service capuchins be single, they are in essence a servant. Statistics show that capuchins need to have a companion.

Mr. Sirb made a motion to grant Special Exception 07-06, conditioned upon the applicant providing the Township with the proper documentation from the Game Commission that shows that she has been granted this menagerie permit, and that it specifically say that she can have two capuchin monkeys.

Mr. Dowling called for a second to the motion, receiving no response.

Mr. Dowling asked if the Board has been provided with the Game Commission requirements. Ms. Moran answered no, and noted that she spoke to a representative from the Game Commission who explained that Ms. Berger does need to have Township approval in order to complete their process and that she has almost completed her two year waiting period, and it is now time for her to reapply. Ms. Moran stated that the

applicant cannot proceed to apply for the permit without the approval of the Township. The Zoning Hearing Board's decision does not necessarily determine whether she gets the second monkey. The Game Commission has many regulations and requirements, one of which is Township approval. Ms. Berger confirmed what Ms. Moran said.

Mr. Dowling suggested that the Township could say yes, and the Game Commission could still say no. Ms. Moran agreed, noting that she cannot go to them without the Township's approval. The Township's approval does not grant Ms. Berger the menagerie permit.

Mr. Sirb stated that if Ms. Berger does not get the menagerie permit, the special exception goes out the window because it is conditioned upon the Game Commission's approval.

Mr. Dowling stated that the motion is to grant the special exception, but without a second, the application will be denied.

Mr. Dowling seconded the motion.

A roll call vote followed: Mr. Staub-Aye; Mr. Sirb-Aye; Ms. Cate-Aye; and Mr. Dowling-Aye. Special Exception 07-06 was granted.

The hearing ended at 9:30 pm.

Respectfully Submitted,

Michelle Hiner
Recording Secretary